The Native Commissioner's attention is invited to the case of Duba *v.* Nkosi, 1948 N.A.C. (N.E.D.) 7, in which it was laid down that Native Commissioners would be well advised to record the name of the tribe to which the respective parties belong.

The Assistant Native Commissioner in his reasons for judgment has quoted various cases but the present case can easily be distinguished from those. The cases referred to were not in respect of a woman suing her guardian for redress.

The appeal is allowed with costs and the Assistant Native Commissioner's judgment is altered to read " exception dismissed with costs ".

The record is returned to the Native Commissioner to hear the case on its merits.

For Appellant: Adv. H. H. Moll, instructed by Messrs. Mentz & Wessels, Tzaneen.

For Respondent: In default.

Cases referred to:—

Magawana *v.* Nonanti, N.A.C. 1922, page 160.
Nosentyi *v.* Makonza, 1. N.A.C. 37.
Myuyu *v.* Nobanjwa, 1947 N.A.C. (C.O.) 68.
Duba *v.* Nkosi, 1948 N.A.C. (N.E.D.) 7.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I
Part VII

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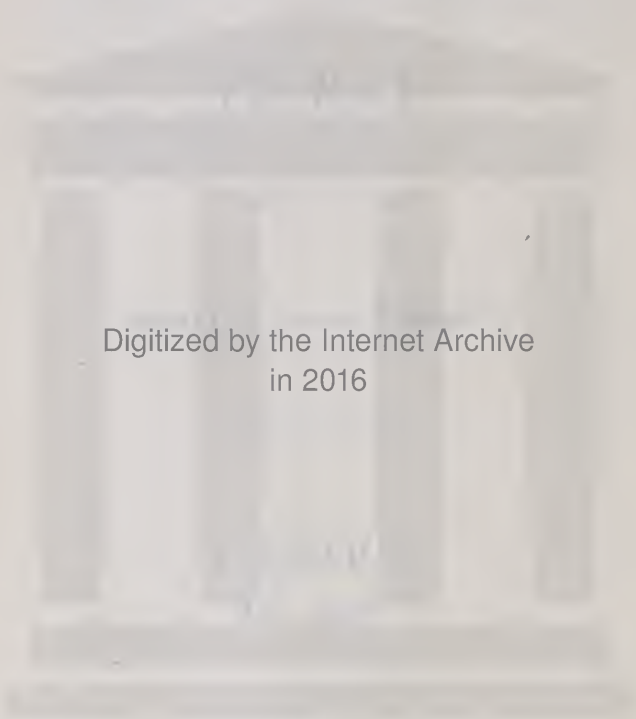

CASE No. 1 OF 1950.

JOSIAH MNTAMBO (Appellant) *v.* HERBERT NDABA (Respondent.

(N.A.C. Case No. 30/3/1949.)

VRYHEID: Tuesday, 3rd January, 1950: Before Steenkamp, President, Robertson and Oftebro, Members of the Court (North-Eastern Division).

Law of Delicts: Seduction—"metsha" custom external connection.

Practice and Procedure: Typing of copies.

Held: Girl can be rendered pregnant if only external intercourse had been practised.

Held: That Clerks of the Court should not type on the reverse side of flimsy paper.

Appeal from the Court of the Native Commissioner, Nqutu.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant for damages which he suffered as a result of the defendant (a school teacher) having seduced his daughter and rendered her pregnant. All the material facts were admitted by the defendant, namely, that the girl Philda was his sweetheart and that he had had external connection with her. Defendant is under the impression that by having only external connection he could not render the girl pregnant.

In the case of Penxa and another, *v.* Fani, 1947 N.A.C. (C.O.) 120, it was held that the admission that the girl was the defendant's "metsha" at the time she conceived is in itself in Native Law corroborative evidence of the girl's statement that defendant is the farther of her child.

There is also the case of Marman *v.* Blakfesi and another, 1938 N.A.C. (C.O.) 94, where it was remarked that under the custom of "ukumetsha", full intercourse does not as a rule take place, but semen is emitted between the thighs of the girl in close proximity to the vagina and it is therefore possible that some of the spermatozoa may find its way into the womb and so cause pregnancy.

In Bokwe *v.* Kabane, 1933 N.A.C. (C.O.) 43, medical evidence was called and it was testified that although the vagina was intact, the girl was pregnant.

No good argument has been advanced to enable this Court to state that the Native Commissioner has erred in his judgment and the appeal is therefore dismissed with costs.

It is desired to point out that Clerks of Court or other officials who, having been allotted the duty to prepare typed copies of records, should not type on the reverse side of flimsy paper, as this obliterates the words on both sides of the paper. In the present case the Messenger's return of service is typed on the back of the flimsy paper and therefore it is impossible to read the first two paragraphs of the summons.

For Appellant: Mr. Turton, instructed by Messrs. Henwood & Co., Vryheid.

For Respondent: In person.

Cases quoted with approval:—

Penxa and another *v.* Fani, 1947 N.A.C. (C.O.) 120.
Marman *v.* Blakfesi and another, 1938 N.A.C. (C.O.) 94.
Bokwe *v.* Kabane, 1933 N.A.C. (C.O.) 43.

CASE No. 2 OF 1950.

MTIBELI NTOMBELA (Appellant) *v.* MBHASOBHENI MPUNGOSE (Respondent).

(N.A.C. Case No. 29/3/1949.)

VRYHEID: Tuesday, 3rd January, 1950: Before Steenkamp, President, Robertson and Oftebro, Members of the Court (North-Eastern Division).

Law of Contracts: Capacity to contracts—Native woman.

Held: that the plaintiff chose to purchase cattle from a Native woman, and he only has himself to blame if it is found later on that the guardian is not a willing party.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp, President (delivering the judgment of the Court):—

Plaintiff sued the defendant in the Native Commissioner's Court claiming four head of cattle. Defendant pleaded a denial that plaintiff is the owner of the cattle concerned. The Native Commissioner entered judgment in favour of plaintiff as prayed. Against this judgment an appeal has been noted on the following grounds:—

(1) That the judgment is against the evidence and the weight of the evidence.

(2) That the learned Native Commissioner failed to take due cognizance of the fact that Dakane Ntombela is a perpetual minor in Native Law and as such could not own or deal in cattle.

(3) That the plaintiff's claim is not supported by the evidence adduced in that whereas it is alleged in the summons that the plaintiff purchased the cattle from Dakane Ntombela the evidence did not establish that Dakane Ntombela was the owner of the cattle or otherwise legally capable of disposing of them.

After plaintiff had called three witnesses the case was postponed and on resumption, and before calling the fourth and last witness, it was reported that defendant had died. Thereafter a minor son of the late defendant, by name of Sivavane Ntombela, duly assisted, was substituted as defendant.

It is common cause that the late Pakede had 20 wives and that one of his widows is Dakane, in whose house there is no male issue. The defendant was general heir and guardian of Dakane after the death of Pakede. Subsequently Dakane sold the cattle in dispute to the plaintiff. The origin of the cattle is not disputed. Dakane's late brother gave her £1 and she bought a sheep which increased and she eventually sold the sheep and bought an "incokazi" cow which has increased to the four cattle now claimed. There is a dispute as to whether the late defendant gave Dakane the necessary permission to sell the cattle and this conflict of evidence will be dealt with later on. It is desired first of all to decide whether Dakane could have disposed of the cattle of her own free will without the permission of the guardian.

According to Section 96 (2) of the Code, a Native woman, who is a perpetual minor in terms of section 27 (2) of the Code, may deal with an "ngqutu" beast for the benefit of her house, or as she may deem fit. Section 107 of the Code lays down that when a girl enters into a customary union, her farther may give

her goods or cattle and such become the property of and belong to the house established by such union. It is specifically prescribed that the "ngqutu" beast may be dealt with by the woman as she may deem fit. No such provision exists in respect of goods received as a present on her marriage and therefore it follows that although the property belongs to her house, she may not personally dispose of it without the permission of her husband or guardian.

Having held that the woman Dakane could not legally dispose of the cattle without the consent of her guardian, there still remains the question whether or not he gave the neccessary permission.

Dakane in her evidence states that she felt she could do with the cattle as she pleased, and that she did not even need the consent of her late husband who could not have stopped her. She admits she did not ask defendant's consent to sell but that she notified him that she had done so. Later on, still under cross-examination, she states she informed defendant that she would sell the cattle to plaintiff. She also admits defendant had the custody of the cattle. Her version is that when she informed defendant she was selling, he kept quiet. She is not corroborated in this by another witness called by the plaintiff. This witness states defendant agreed and he spoke up when he did so, and spoke to Dakane. This same witness contradicted himself when he later stated that defendant kept silent.

Plaintiff bases his claim on the fact that he bought the cattle from Dakane, a woman. He should never have negotiated with a woman unless he was certain she had her guardian's consent to dispose of cattle running at the kraal of the guardian who, after all, is presumed to be the owner of all the cattle at his kraal.

Dakane further states she disposed of the cattle because she was starving. If this were true that she was in want she had her remedy under section 168 of the Code.

The Native Commissioner in his reasons for judgment found that the probabilities swung the balance in favour of plaintiff's story that consent was given tacitly by the guardian. He seems to have accepted that the late defendant raised no demur when the sale was reported to him—the implication being that consent was tacit. We cannot agree with this finding in view of the conflicting evidence given by plaintiff's witnesses. Moreover, as soon as plaintiff went to fetch the cattle he had purchased the late defendant refused to hand them over and therefore it is just as probable that he never gave consent.

A person who deals with minors must satisfy the Court without doubt that the guardian had given consent. In fact he should negotiate with the guardian who in turn will, if it is deemed expedient, consult the woman to whose house the cattle belong.

The plaintiff chose to purchase cattle form a woman and he only has himself to blame if it is found later on that the guardian is not a willing party.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Absolution from the instance with costs".

For Appellant: Mr. Conradie of Messrs. Conradie & White, Vryheid.

For Respondent: In person.

Laws, etc., referred to:—

Proclamation No. 168 of 1932:—
Section 27 (2).
Section 96 (2).
Section 107.

CASE No. 3 OF 1950.

MANDATA SIHLANGU (Appellant) *v.* MANYOSI SIHLANGU AND OTHERS (Respondents).

(N.A.C. Case No. 15/6/49.

PIETERMARITZBURG: Monday, 16th January, 1950: Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Donation: Landed property.

Description of Land: Remuneratory donation.

Held: That a remuneratory donation cannot be revoked at any time.

Held: That so long as description of the property is such that it can sufficiently be identified, the law has been complied with.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp, President (delivering the judgment of the Court):—

The seven plaintiffs are suing the defendant for an order allowing them to employ a surveyor to enter on the farm South Slopes in the Ixopo District to survey off plots which the plaintiffs respectively acquired from the defendant in terms of a written agreement of donation and for the transfer of the property after survey.

The defendant pleaded to the effect that the plaintiffs are not entitled to transfer of the ground in view of paragraph 7 of the agreement which reads as follows: "It is distinctly understood by the parties that one Peter Mfeka had laid claim to a portion in extent one hundred and fifty-six and a half (156½) acres of the farm 'South Slopes', and it is understood by them that should the first party be compelled to give transfer of the said one hundred and fifty-six and a half (156½) acres to Peter Mfeka, this agreement shall lapse and become of no force and effect." He alternatively pleaded that as he is not the registered owner of the property in question the plaintiffs are not entitled to transfer until the defendant himself has obtained transfer into his name. He also pleaded that the alleged agreement is null and void and of no legal effect, in that the portions alleged to have been sold to the plaintiffs are insufficiently described and therefore the agreement is not capable of being enforced and is void for vagueness.

The Native Commissioner entered judgment for plaintiffs as prayed with costs and against this judgment an appeal has been noted on the following grounds:—

(1) that the judgment is against the weight of evidence in that upon the facts and probabilities the Court should have found for the defendant.

(2) the judgment is contrary to law in that, *ex facie*, the alleged agreement, the portions alleged to have been given to the plaintiffs are insufficiently described and consequently the alleged sale is void for vagueness and incapable of being enforced.

From the evidence it appears that the defendant inherited the farm South Slopes, measuring 294 acres odd, from his late brother Bungane. This farm has as yet not been transferred from the estate of the late Bungane to the defendant. After the death of Bungane a person by the name of Peter Mfeka alleged that he had purchased a portion of the farm from the late Bungane. Mfeka's place was taken by one Ferdinand Miya and

a civil case thereafter culminated in the Native Commissioner's Court. The case was eventually settled out of court and the effect of the settlement was that the defendant had to pay to F. Miya the sum of £60.

Now, the plaintiffs have been in occupation of portions of the farm for many years. Although only two of them, that is, plaintiffs Nos. 1 and 2 gave evidence, it is safe to say that the plaintiffs have been living there all their lives. This is admitted by defendant. It is not clear whether they were lessees or tennants at will but this makes no difference to the present claim. In order to assist the defendant to defend the previous action brought against him all the plaintiffs contributed financially towards the costs of the action that was pending.

If the claimants in the previous cases had been successful then the plaintiffs could have been evicted from the farm. They, therefore, assisted the defendant financially to secure their rights of occupation.

After the previous cases the defendant entered into a written agreement with the plaintiffs whereby he agreed to transfer to each one of them a portion of the ground ranging from ten acres to twenty acres each.

It is necessary to quote the salient points in the preamble of this agreement. This reads as follows:—

> "Whereas the first party (that is, defedant) out of affection for the second party (that is the seven plaintiffs hereto) and in acknowledgment of the help and assistance rendered him by the second parties hereto is desirous of giving and donating to the second parties portions of the said farm South Slopes.
>
> "And whereas, the second parties hereto accept the said gift and donation.
>
> "And whereas it is desirable that the terms and conditions of such gift should be reduced to writing."

Thereafter it is set out in paragraph (1) of the agreement the extent of the ground donated to each of the plaintiffs. To the agreement is attached a sketch on which is indicated roughly the piece of ground donated to each of the plaintiffs. This sketch was taken from a diagram of the farm in question.

A portion of the farm, in extent 100 acres, had already been surveyed and sold to a man by the name of Madhletse. This is shown on the northern section of the farm. Then the lot donated to plaintiff No. 3 is given on the eastern section of the farm. This plot was, therefore, clearly indicated on the diagram and is bounded on the north by portion of the southern boundary of the plot sold to Madhletse. The eastern boundary is the boundary of the farm and the southern boundary is a river. The piece of ground donated to plaintiff No. 3 is clearly described. Now, the same applies to the pieces of ground donated to the other plaintiffs. The only point which is not clear is, the one boundary which can only be indicated with precision after ground has been surveyed, which up to date has not been done.

Coming to the legal issue, we have to refer to the case of van Wyk *v.* Rottchers Sawmills (Pty.), Ltd., 1948 (1) S.A.L.R. p. 983. In that case, *Watermeyer* (*C.J.*) is reported to have stated "meticulous accuracy of description is, however, not necessary because the maxim *certum est quod certum reddi protest* applies. The provision that the contract of sale must be in writing cannot mean that the only evidence by which a property can be identified must be contained in writing because that is impossible." He also stated that the contract of sale of land in writing is in itself a mere abstraction, which consists of ideas expressed in words, but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without evidence. For a skilled person the evidence of a mere inspection coupled with his own local knowledge may be sufficient to identify the property described.

The way I read that report, I understand it to mean that so long as description be given of the property sufficiently for it to be identified, then the law has been complied with. The two plaintiffs who gave evidence were able to satisfy the Court below that they knew what ground they acquired and for the defendant to identify which ground he was allocating to the various plaintiffs. In my opinion, apart from the oral evidence given by the witnesses for plaintiffs, the annexure to the agreement sufficiently indentifies the property. Therefore ground No. 2 of the notice of appeal falls away.

The question was also raised in the Court below that, as this was a donation the defendant could at any time revoke it, but I am not satisfied that this was an ordinary donation. It is what is called a remuneratory donation. The plaintiffs in consideration of the donation had actually contributed money towards the expenses incurred by the defendant in defending the action by an alleged previous purchaser.

In the case of Avis *v.* Verseput, 1943 A.D. 331, it was held that a donation made as a *quid pro quo* is not a donation properly so called. It was also held that in Roman Dutch law remuneratory donations are exempted from the restrictive rules governing donations in general by reason of the fact that they are not inspired solely by a disinterested benevolence but are, as a rule, made in recognition of or in recompense of benefits received. It is also necessary to deal with clause 7 of the agreement already mentioned.

There is evidence on record that Peter Mfeka was not successful in obtaining a portion of the farm and therefore this clause cannot be relied upon by the defendant in disputing the claim of the plaintiffs. In fact the defendant states he is negotiating a sale with one Kumalo and that the donation was a mere blind and a form of deceit.

Defendant is responsible for the delay of twenty years in getting the ground transferred into his name and therefore the plea that he cannot effect transfer is without substance. Counsel for appellant has argued that according to the evidence adduced by the plaintiffs, Peter Mfeka had already died when the deed of donation was entered into on 31 July, 1936, whereas according to clause 7 of the deed it would appear that Peter Mfeka was still alive.

Defendant states that Peter Mfeka was alive when the agreement was entered into. It is quite possible that the plaintiffs have made a mistake which in the opinion of this Court does not go to the root of the merits of the case and may be ignored as it does not cause any prejudice to the defendant.

In summarising the above, this Court is satisfied that this was a remuneratory donation and that the pieces of ground donated to the various plaintiffs were sufficiently described in the deed to identify the property. The Court has, therefore, come to the conclusion that the appeal must fail.

The judgment which reads: "For plaintiffs as prayed with costs" will probably cause confusion in the office of the Surveyor-General and the office of the Registrar of Deeds and it is desirable to set out the judgment more fully in terms of the prayer.

In dismissing the appeal with costs, the Native Commissioner's judgment is altered to read as follows:—

1. It is ordered that each plaintiff is entitled to the land allotted to him in terms of the agreement attached to the summons.
2. It is ordered that a surveyor is empowered to survey the ground as near as possible to the portions indicated on the sketch attached to the agreement referred to in paragraph 1 and to prepare the necessary diagrams.

3. It is ordered that the defendant shall sign the necessary documents to enable the Registrar of Deeds to effect transfer of the property to the respective plaintiffs. If he fails to do so within a period of two months after the surveyor has prepared the diagrams, then it is ordered that the Clerk of the Native Commissioner's Court, Ixopo, may sign the necessary documents.

4. Defendant to pay costs of this action.

For Appellant: Adv. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermartizburg.

For Respondent: Mr. G. Clulow of Ixopo.

Casses referred to:—

Van Wyk *v.* Rottchers Sawmills (Pty.), Ltd., 1948 (1) S.A.L.R. p. 983.

Avis *v.* Verseput, 1943 A.D. 331.

CASE No. 4 OF 1950.

MHAMBI MSOMI (Appellant) *v.* NZUKA MSOMI (Respondent).

(N.A.C. Case No. 15/4/49.

PIETERMARITZBURG: Monday, 16th January, 1950: Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Native Law: Maintenance—"Isondhlo"—Deceased's wife and children.

Held: That no "isondhlo" is due and payable where the claimant had the use of the estate property to maintain the deceased's wife and children.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp, President (delivering the judgment of the Court):—

Plaintiff is the younger brother of the defendant and in his claim before the chief he alleges that he maintained the family of his younger brother, the late Msongelwa, who died about 1928 and for this he claims "isondhlo" at the rate of two head of cattle for 21 years, making a total of 42 head of cattle.

The Chief awarded the plaintiff 21 head of cattle, but on appeal to the Native Commissioner this was reduced to five head of cattle with costs.

Defendant has now noted an appeal to this Court on grounds which may be summarised to mean that the judgment is against the weight of evidence and probabilities of the case and secondly that as the defendant (appellant) was successful in getting the judgment reduced from 21 head of cattle to five head of cattle he is entitled to costs.

From the evidence as adduced by plaintiff it appears that after the death of the late Msongelwa his father gave direction that his widow Mamkumbi and her two children, both girls, should be looked after by the plaintiff who was the second son. The defendant was the eldest son and as he was sickly and poor he was not able to undertake this duty. He would eventually become the heir to the property rights in the two girls and naturally it was in his interest to maintain the widow and the two girls if they required maintenance apart from what could be provided out of the estate of the late Msongelwa.

When Msongelwa died the plaintiff was working at Durban and on his return two months later he alleges his father assigned to him the duty of maintaining the widow and children. The plaintiff, however, admits that about fourteen days after his brother's death the widow and children went and lived at her brother Five's kraal and according to him they remained there until 1938 when he built a kraal for her. He is not supported by his witnesses in this respect. One witness states she only lived with Five for four years. Another witness states she only moved from Five's kraal about two years ago. Five, who gave evidence on behalf of defendant, states: "I have now removed her from my kraal as one Mketa Dhlamini has ngenaed her. She has had children by him. I have built the hut in which she now lives."

It should therefore be accepted that the widow lived at her people's kraal from the time of her late husband's death until quite recently.

There is the question as to who built the hut or kraal for her. Plaintiff states he built her a kraal about two miles from his kraal. He is supported by one witness who states he saw plaintiff with his own eyes preparing the "daga" and put the thatch on with his own hands. Another witness states that plaintiff built the hut for her by getting other people to erect it. Still another witness goes further and states the people who built the hut were paid in beer and that the widow made the beer.

It is on such evidence that plaintiff relies that he built the kraal and maintained the widow and her children. This Court is not prepared to accept this evidence.

We now come to the question of actual maintenance. By maintenance, as we understand it, is normally meant feeding, clothing and housing. It is clear from the evidence that the plaintiff never housed the family of his late brother. The widow's brother Five did this.

There is not much evidence as to what property the late Msongelwa possessed when he died but it is clear from the evidence that the widow had a field and a small garden. Plaintiff admits he and the widow had quarrelled over some cattle, so there must have been cattle. One witness for defendant states that when the widow went to her brother Five she had arable lands and a span of oxen. The woman also states that the one year when plaintiff ploughed the land he used his own oxen *and one of hers.*

Defendant admits he has not supported the widow and children and states that her brother Five has been doing so and he has already allowed Five £8, the equivalent of one beast as "isondhlo" for the one daughter who is now married. Whether Five is entitled to "isondhlo" is another matter and this Court only has to deal with the case between plaintiff and the defendant.

This Court does not for a moment doubt that the plaintiff has assisted the widow with her ploughing but this is no more than what Natives usually do in the reserves. They assist each other without expecting any remuneration, and it seems to be natural that when a widow needs assistance, the brothers of her late husband would be the first to help.

The Native Commissioner would appear to have concentrated on certain conflicting and contradictory evidence given by the widow who was called by the defendant, but he has overlooked the fact that the onus of proof was on the plaintiff, and his evidence and that of his witness differ to such an extent that it is impossible to decide with certainty whether he supported the widow and children. He might have assisted her from time to time but this is as far as the evidence takes us.

In the case of Mgumbi *v.* Bhateta, 1932 N.A.C. (C.O.) 57, the Native Assessors gave the opinion which was agreed to by the Court [*Barry* (*P*). presiding] that the uncle who brought up the children cannot claim "isondhlo" seeing the children brought cattle and land out of which they were maintained.

Stafford in his book on page 150 quotes this case and states: "But if the claimant has had the use of the estate property from which to maintain the children, he has no claim. The principle in Natal is the same."

It is not necessary to deal with the question of costs as the defendant must succeed in his appeal.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

> "The appeal is allowed with costs and the Chief's judgment is altered to read 'For Defendant with costs'."

For Appellant: Adv. D. L. Shearer, instructed by H. L. Bulcock, Esq., of Ixopo.
For Respondent: Mr. G. Clulow, Ixopo.

Cases quoted:—

Mgumbi *v.* Bhateta, 1932 N.A.C. (C.O.) 57.

CASE No. 5 OF 1950.

MVUNGAZELI MAZIBUKO (Appellant) *v.* MAHOYANA MAZIBUKA (Respondent).

(N.A.C. Case No. 8/7/49.)

PIETERMARITZBURG: Tuesday, 17th January, 1950: Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure: Application, amendment, notice of appeal —Additional grounds.

Law of Things: Allocation of lands—In Native areas prior to Land Proclamation, 1931, *after death of allottee.*

Held: That an application for inclusion of additional grounds of appeal cannot be entertained where such grounds are in effect a plea which should have been raised as an issue in the Court below.

Held: The fact that land was usually allotted to the heir who had responsibility of maintaining the family of a deceased, did not give the heir the right to the land to such an extent that he may, after a period of 20 years, sue the actual bona fide occupier for the crops he had reaped.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp, President (delivering the judgment of the Court):—

First we have to deal with the application for the amendment of the grounds of appeal by including therein an additional ground which reads as follows:—

> "That the defendant was a bona fide possessor."

This defence was not taken in the Court below although it is one of those defences which are so obvious and it rather surprises this Court that the attorney of record had not considered it at the trial.

Following the case of Mzobe and another *v.* Tushini and others, 1949 N.E.D. 1, the application is refused. In that case the Court remarked that the additional grounds which were sought to be inserted are in effect a plea that should have been raised as an issue in the Court below. The same remarks apply in the present appeal.

The Plaintiff, son and heir of the late Mgidhla Mazibuko, sued the defendant in the Native Commissioner's Court for—

(1) certain goats and cattle which belonged to the estate; and

(2) the value of crops over a period of twenty years in respect of certain three lands.

The Native Commissioner dismissed the first claim, but on the second claim he entered judgment in favour of plaintiff for £50 and costs.

The second claim was for £1,000. The plaintiff was not satisfied with the award of £50 and he has now appealed to this Court against the *quantum* of the amount awarded. The defendant has cross-appealed.

The facts are that the late Mgidhla had about twenty lands divided amongst his three houses. The third house had three lands and the wife in this house was Ngoconwana, who had one child, namely a girl.

On Mgidhla's death when plaintiff was a minor aged about 15 years, the widow Ngoconwana went and lived with the defendant who was a younger brother of Mgidhla, in a different house. Defendant ploughed her three lands and supported the widow for a period of about 10 years, when they parted. There is a dispute as to whether Ngoconwana was "ngenaed" but this is not material, as the fact remains defendant supported her and her daughter.

Defendant occupied the three lands from about 1928 for 20 years and plaintiff now alleges that defendant had no right thereto and should account to him for the crops reaped over this period.

Plaintiff in his evidence admits that the lands were taken away from him by the Chief and that defendant ploughed the lands and used the crops to support Ngoconwana. In his evidence he states:—

> "Defendant ploughed the fields in order to maintain these women (meaning Ngconwana and her daughter). Defendant told me not to use the lands as he wanted to plough them to maintain these women. I did not agree to it and reported to Chief Mjwayeli and the Chief said defendant could use the lands for that purpose. Defendant was given three fields."

In fact the impression gained from the record is that defendant was a bona fide occupier of the lands and because he was an enterprising and industrious person and reaped up to 200 bags of grain a year, plaintiff now reckons he is entitled to the proceeds of the lands.

Unfortunately in the Court below the issue was confined to the question as to whether Land Proclamation, No. 123 of 1931, is applicable to the occupation of these lands, but we cannot get away from the fact that during 1928 when Mgidhla died, his lands had to be dealt with in accordance with the land regulations in force at that time, and if the defendant was in occupation of the land on 1st July, 1931, then in accordance with section 2 of Proclamation No. 123 of 1931 he must be deemed to be lawfully occupying the land in question. I hold this view irrespective of the question of bona fide occupation, as this point was not taken in the Court below.

Reverting to the Land Regulations in force prior to the 1st July, 1931, reference to Government Notice No. 49 of 1902 will show that according to paragraph 7, arable land may only be allotted by the Chief to any person whose name appears on the Hut Tax Register. It therefore follows that when an allottee dies, the allotment lapses and the land is available for allotment to a Hut Tax-payer. This Court is fully aware of the fact that such land was unsually allotted to the heir who had the responsibility of maintaining the family of the deceased, or the heir was tacitly allowed to use the land for such purpose or for his own use. This still did not give the heir the right to the land to such an extent that he may, after a period of 20 years, sue the actual occupier for the crops he had reaped.

Counsel for plaintiff has advanced the argument that there was no plea or evidence that the land in question is situated in a Native Reserve. This argument cannot be entertained as the whole case was conducted on the presumption that the land is under a Chief in a Native Location.

It is clear from the evidence in this case that the Chief permitted defendant to plough the lands. Plaintiff had no such permission and I fail to see how he can now seek to benefit from good crops reaped by an enterprising occupier.

The Native Commissioner in awarding the plaintiff the sum of £50 states in his reasons that prior to the issue of Proclamation No. 123 of 1931 there were no regulations governing the occupation or succession to arable allotments in the Native Reserves in the Province of Natal and that when an allotment holder died his heir automatically succeeded to the allotment. The Native Commissioner has overlooked the existence of Government Notice No. 49 of 1902 which has already been referred to. He based the award of £50 on what he considers was the profit made by defendant during the seasons 1928-29 and 1929-30 at £25 per season. He further states when Proclamation No. 123 of 1931 came into force on the 1st July, 1931, the defendant was in occupation and according to section 2 he was deemed to be lawfully in occupation of the land. On the Native Commissioner's own arguments he should have awarded £25 for the year 1930-31, but as remarked above the plaintiff had no right to the lands and the only person to whom it seems the land had been given by the Chief was the defendant because he had to support the widow.

The appeal for an increased award must fail and the appeal is dismissed with costs.

Coming to the cross appeal, all the Court can state is that there would appear to have been some laxity on the part of the defendant's attorney in not preparing the case properly. He has concentrated on Proclamation No. 123 of 1931 which has no bearing on the case and it would have been more advisable to have depended on the legal issues applying to bona fide occupation.

The cross appeal must succeed with costs on the grounds outlined above, and the Native Commissioner's judgment is altered to read:—

"Claim No. 2: Judgment for defendant with costs."

For Appellant: Adv. G. Caminsky, instructed by J. M. K. Chadwick, Esq., of Estcourt.

For Respondent: Mr. A. E. de Waal of Messrs. Hellet & de Waal, Estcourt.

Statutes, Proclamations, etc., referred to:—

Government Notice No. 49 of 1902: par. 7 (Natal).
Proclamation No. 123 of 1931.

Cases referred to:—

Mzobe and another *v.* Tushini and others: 1949 N.E.D. 1.

CASE No. 6 OF 1950.

JASON TSHANGE (Appellant) *v.* ELLIOT NTOMBELA (Respondent).

(N.A.C. Case No. 32/6/49.)

PIETERMARITZBURG: Wednesday, 18th January, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Associations: Delegation of powers by life trustees.

Held: A life trustee, appointed as result of the fullest confidence in him, cannot delegate his powers to another without sanction of the Association.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp, President (delivering the judgment of the Court):—

From the record it appears that the Ockerts Kraal Cemetery Association appointed Reginald Goba and Solomon Ngwanya as life trustees, who shall act as permanent Chairman and Secretary of the Association and Advisory Committee. According to the constitution of the Association these two trustees shall represent the Association in any Court of Law.

Reginald Goba went to the Fort Hare University for three years and in his place the general meeting appointed H. Mphuthi as acting trustee during the absence of Goba from January, 1948.

Thereafter the Association had occasion to find fault with the defendant and it was decided to sue him. It is not necessary to set out the nature of the action.

According to the constitution only the trustees may represent the Association in a court of law but the trustee Solomon Ngwanya and the substituted temporary trustee Mphuthi gave the plaintiff, Elliot Ntombela, a general power of attorney with powers of substitution to act for them in all matters which would of course cover the right to sue or defend an action on their behalf.

At the outset defendant excepted to the summons on the grounds that plaintiff has no power to sue. The Native Commissioner over-ruled these exceptions which he considered were merely technical, and thereafter the case proceeded on its merits.

After evidence had been led, judgment was given in favour of plaintiff, and an appeal has now been noted to this Court.

The grounds of appeal cover 2½ pages of typewritten matter which, to say the least, was unnecessary and could have been curtailed to a few sentences.

The ground mainly relied on by Counsel for appeal is No. 3 which reads as follows:—

> "The trutees are appointed for life and are not entitled under the constitution to delegate their powers in the institution of legal actions to agents, or to sue in the names or name of any agent, and there is no special authority to plaintiff in any of the powers to sue defendant."

Duly appointed agents have implied authority to appoint sub-agents but there is a limit to this power.

The Association was the principal and the members thereof in their wisdom appointed two life trustees. A life trustee or any trustee for that matter has considerable responsibilities and no Association will appoint such a trustee unless its members have the fullest confidence in him.

On page 92 of the Law of Agency by de Villiers & McIntosh (1933 Edition) it is stated that authority to employ a sub-agent is implied where the act does not require the personal care, skill or discretion of the principal. The learned authors go on and state on page 93 (quoting Pothier 1. C.) that the question whether there is implied authority to delegate depends on the nature of the affair which is the subject of the mandate. If it demands "a certain prudence, a certain skill, it should not be presumed that a principal who enstrusted its execution to the agent, relying on his prudence and skill, would have been willing to allow him to delegate it to another, e.g., compromise of a law-suit".

In Bowstead on Agency on page 110 it is stated the power to delegate is implied where the act done is purely ministerial and does not involve confidence or discretion. Illustration 2 on page 111 gives the example of a board constituted by statute and authorised to delegate its powers to a committee. It was held that the committee must exercise in consert the powers delegated to them and could not apportion them amongst themselves.

Delegata potestas non potest delegari (a delegated power cannot be delegated). A person to whom powers have been delegated cannot as a general rule delegate these powers to another so as to release himself from liability unless the power to delegate has been expressly conferred upon him. The reason for this is that in conferring the powers there has been a *delectus personae* or choice of a particular person on account of his character or ability (Bell's Legal Dictionary).

This Court cannot conceive any association of persons appointing a life trustee unless they have full confidence in him on account of his character or ability. It must be accepted that when the association appointed Reginald Goba and Solomon Ngwanya as life trustees, they intended that duties appertaining thereto should be undertaken by them personally and by no one else without their prior approval. In this case authority was granted to H. Mphuthi to act for Goba for a period of three years and therefore the former's appointment was in order, but whether he and the other life trustee, Solomon Ngwanya, could delegate the power by power of attorney, is another matter. The way I read the law on this particular aspect of the case as outlined above it is clear that only the trustees who are the agents of the Association may perform the important duties of suing on behalf of the Association and carry out any of the duties requiring performance.

This Court does not encourage exceptions of a technical nature, but where the plaintiff has no power to sue, then the exception taken is in the form of a plea which goes to the very root of the action.

Counsel for respondent has argued that the plaintiff's action in suing was ratified at a quarterly meeting held on the 5th October, 1948 (i.e. after summons had been issued), but he has lost sight of the fact that the constitution can only be amended at the annual general meeting, and it is plain from paragraph 5 of the constitution, the Association may sue or be sued in the names of the trustees. Only if this paragraph has been amended in the proper manner may it be departed from and no power of ratification at a quarterly meeting can cure any departure from the constitution.

The plaintiff has no power to sue and therefore the summons should have been dismissed.

The appeal is allowed with costs against plaintiff personally and the Native Commissioner's judgment is altered to read:—

"Summons dismissed with costs against plaintiff personally."

For Appellant: Adv. J. D. Stalker, instructed by Messrs. H. Herschensohnn & Co., Pietermaritzburg.

For Respondent: Advf. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritkburg.

CASE No. 7 OF 1950.

JOAKIM CELE (Appellant) *v.* HEZEKIAL NDOKWENI (Respondent).

(N.A.C. Case No. 33/3/49.)

DURBAN: Monday, 30th January, 1950: Before Steenkamp, President, Ashton and Craig, Members of the Court (North-Eastern Division).

Law of Evidence: Credibility of witnesses.

Damages: Trespass on to a cultivated field—Onus is on plaintiff to prove special damage.

Held: That once a party is not believed on one aspect of a case, then it is felt that a good argument will have to be advanced for accepting such party's evidence on another aspect in such a case.

Held: That the onus is on the plaintiff to prove damage and according to section 136 of the Code, trespass on cultivated land does not found an action for damages unless the trespass is accompanied by special damage.

Appeal from the Court of the Native Commissioner, Pinetown.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sues the defendant in the Native Commissioner's Court—(*a*) for £35 damages for a certain field of rice destroyed by defendant's cattle; and (*b*) £10 damages for assault. Defendant pleads "not indebted".

After the hearing of the case the Native Commissioner gave judgment in favour of plaintiff for £12 and costs on claim (*a*). He entered no judgment in respect of claim (*b*) but in his reasons for judgment the Native Commissioner states:—

"The Court is not satisfied with the evidence regarding the alleged assault, and thus excluded this in giving judgment for plaintiff in respect of the damages to the rice only."

An appeal has been noted to this Court on the following grounds:—

(1) That the judgment is against the weight of evidence and bad in law.
(2) That the learned Native Commissioner failed to pay sufficient regard to the probability that in view of a previous dispute the complaint was falsely brought.
(3) The defendant had provided a herdboy who is alleged to have been in attendance when the animals entered the rice-field.
(4) If the field had in fact been fenced then the plaintiff failed to keep the fence in proper repair.

(5) As the learned Commissioner accepted the defendant's version of the assault, he should have rejected the plaintiff's evidence *in toto*.

(6) The witnesses called in support of plaintiff's case were relations and therefore not independent.

(7) In view of the condition of the rice stalks, the learned Commissioner should have held that they had been cut as is the case when the rice is reaped.

(8) That plaintiff should have been non-suited for his failure to observe the recognised customary steps in cases of alleged damage to cultivated crops.

This Court wishes to deal with ground (5) first. From the Native Commissioner's judgment it is apparent that he did not believe the plaintiff's version in so far as the assault is concerned and therefore this Court is of opinion that plaintiff's evidence must be looked upon with a certain amount of suspicion. Once it is found that he was not believed on one aspect of the case, then it is felt a good argument will have to be advanced for accepting his evidence on the other claim.

Plaintiff's evidence is to the effect that he is the occupier of certain land on which he had about half an acre of growing rice and when this rice was just about ready for cutting the defendant's stock trespassed and destroyed the whole crop of rice.

In the evidence for defendant it was admitted that his stock trespassed in the rice field but it was averred that by that time the rice had already been reaped.

The defendant's evidence is borne out by the Induna who states that he saw rice was planted the previous year when he passed the field and he also states that he was present at the inspection *in loco* and saw the rice plants and the stalks appeared to have been cut with a sickle and they were all the same length. There is, however, evidence that some of the stalks would appear to have been eaten off, but not much significance can be attached to this, as a stalk already cut might later on be eaten off.

The Native Commissioner held an inspection *in loco* before any evidence was led but unfortunately he has not recorded on the record his findings as to whether the stubs appeared to have been grazed off or had been cut off with a sickle, and this Court therefore feels that the evidence of the Chief's Induna must be accepted.

This Court holds the view that this evidence of the defendant and that of his witnesses should have been accepted in preference to the evidence of plaintiff whom the Native Commisioner had found not to be truthful in connection with the claim for damages for assault.

The onus was on the plaintiff to prove damage and according to section 136 of the Code trespass on cultivated land does not found an action for damages unless the trespass is accompanied by special damage. It therefore feels that "special damage" must be clearly proved and this has not been done.

The appeal is accordingly allowed with coss and the Native Commissioner's judgment is altered to read:—

"Absolution from the instance on both claims with costs".

For Appellant: Adv. J. J. Boshoff, instructed by Mr. G. S. Naidu, of Durban.

For Respondent: Mr. A. D. G. Clark, instructed by Mr. J. F. de Beer, of Pinetown.

Statutes, etc., referred to:—

Section 136 of the Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 8 OF 1950.

STANLEY MHLONGA (Applicant/Appellant) *v.* LEVI V. DUBE AND RUTH Z. MHLONGO (Respondents).

(N.A.C. Case No. 11/1/49.)

DURBAN: Tuesday, 31st January, 1950. Before Steenkamp, President, Ashton and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure: Application, condonation of late noting of appeal—Refused as it is no excuse that appellant had no funds.

Ownership: Acquisition prescription—Immovable property.

Held: That lack of funds is not such an excuse that this Court will condone late noting.

Held: That ownership of immovable property was unknown to Native law and custom and that the plea that prescription is unknown to Native law is therefore without substance in this respect.

Appeal from the Court of the Native Commisisoner, Verulam.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant, Levi Vukevile Dube, in the Native Commissioner's Court for an order of ejectment from a portion of Lot Sub Q of Sub A of the farm Piezang Rivier, situate in the County of Victoria (Verulam).

The defendant is a tenant at will of the property called Lot No. 65 which adjoins Lot Sub Q. Lot No. 65 is registered in the name of Ruth Zemerth Mhlongo, a daughter of the defendant. After summons was issued, application was made by Ruth to be joined as second defendant. This was granted and the case thereafter proceeded against defendant No. 1 and defendant No. 2, Ruth.

The defendants' plea is to the effect that defendant No. 1 bought Lot No. 65 from Elka Cele during 1915 and during 1942 he donated the property to his daughter, Ruth, defendant No. 2. He occupied the ground as pointed out to him by Elka Cele and neither he nor Elka nor the various registered owners of Sub Q were aware of the fact that about two acres of ground of Sub Q were occupied as part of Lot No. 65.

Defendant No. 2, Ruth, filed a counterclaim for a declaration that she has acquired prescriptive title to that portion of Lot Q that has been occupied by her predecessors for more than thirty years as defined by a fence recently wrongfully and unlawfully removed by plaintiff. Plaintiff's plea to the counterclaim is a bare denial.

The onus of proof that defendants had acquired acquisitive prescription right to the ground was accepted by their attorney and evidence was thereafter adduced by defendants and after the close of their case, judgment was applied for and refused. Plaintiff then led evidence with a view to rebutting defendants' allegations.

Judgment was eventually given in favour of defendants on both the claim and counterclaim. The judgment reads as follows:—

> "Judgment for defendants with costs and as prayed a declaration by the Court that second defendant, Ruth Zemerth Mhlongo, has acquired ownership by acquisitive prescription to that portion of Lot Q that has been

occupied by her and her predecessors in title for longer than thirty years, the boundary whereof is indicated by the remains of a fence found in existence by the Court at the time of inspection on 30th March, 1949."

Judgment was entered on the 22nd June, 1949, and an appeal noted on the 16th July, 1949. The notice of appeal and application for condonation of late noting were not in order, and at the previous session of this Court at Durban, the application was refused on the grounds that it was not properly before the Court. Leave was granted to renew the application at the next session of this Court.

An appeal, dated 19th November, 1949, has now been noted on the following grounds:—

(*a*) The Native Commissioner erred in finding that the defendant discharged the onus of proof.
(*b*) The Native Commissioner erred in accepting the evidence of the defendant and his witnesses and rejecting the evidence of the plaintiff and his witnesses.
(*c*) The Native Commissioner erred in finding that the evidence for the defendant established that the two acres of land, being portion of Sub Q of Sub A of the farm Piezang Rivier No. 805, was acquired by the defendants and their predecessors in title by acquisitive prescription.

Alternatively: That the Native Commissioner erred in finding that the defendants and their predecessors in title occupied the said two acres of land *nec vi, nec clam, nec precario* for the period of acquisitive prescription.

Alternative: The Native Commissioner should, on the evidence, have exercised his discretion by holding that the defence of prescription being unknown to Native Law did not constitute a defence to plaintiff's claim for ejectment and should have given judgment in plaintiff's favour.

At the same time an application for condonation of late noting of appeal was also filed. This application is supported by an affidavit by plaintiff's attorney of record. The reason for the late noting can be summarised to mean that the attorney had not been well and therefore he could not carry out his legal work efficiently. He states in his affidavit that he took ill during July, 1949, but he gives no date in July and as far as we know the illness might have commenced after the period for noting of appeal had expired. Reference to the affidavit previously filed shows that applicant's brother only called on the attorney on the 14th July, 1949, i.e., 22 days after the judgment in regard to financial arrangements in connection with the appeal. The attorney had received written confirmation from applicant personally on the 12th July, 1949, to note the appeal but it is clear the attorney would not act until he was placed in funds.

Paragraph 7 of the previous affidavit reads as follows:—

"The appellant's brother called on me on 14th July, 1949, and instructed me to consult Counsel with regard to the prosecution of the appeal and make the necessary financial arrangements."

It is not understood why the attorney should have arranged for the funds as it was the applicant's duty to place his attorney in funds.

It would therefore appear that the main reason for not having noted the appeal in time is that there were no funds and this Court has laid it down on numerous occasions that lack of funds is not such an excuse that this Court will condone the late noting.

The defendants in their evidence and that of their witnesses aver that Elka Cele acquired Lot No. 65 before 1914. The witness Sinkwana Nene, who was accepted by the Native Commissioner to be truthful, states before World War I he erected the fence on instructions from Elka Cele. This is the fence which it is alleged the plaintiff recently removed after a surveyor had pointed out the beacons to him. It must therefore be accepted that Elka Cele occupied the piece of ground in dispute prior to 1914. There is no evidence that the occupation was in any way interrupted. The plaintiff, however, relies on the allegation that this fence was erected long after 1922. The Native Commissioner has not accepted this evidence adduced on behalf of plaintiff.

It is true that Elka Cele did not get transfer of Lot No. 65 until the 5th May, 1917, according to Deed of Transfer No. 2979/1929, but this does not follow that he did not purchase Lot No. 29 long before this and occupied this Lot as well as the portion of Sub Q now in dispute. There is sufficient accepted evidence to prove this.

There is a dispute as to when defendant No. 1 acquired the property. It was not transferred to him until the 29th July, 1929. The power of attorney given by the executors of the estate of the late Elka Cele is dated 15th April, 1929, and in that power it is stated that the property was sold to defendant No. 1 on the 12th April, 1922. Defendant No. 1 was not a party to the power of attorney and he states in his evidence that he cannot understand the reason for the wrong date in the power of attorney. The Native Commissioner in his reasons deals with this aspect and states:—

> "The Court entertains no difficulty whatsoever in accepting that he is correct as to the date of purchase and shares the conviction that this is correct, notwithstanding the power of attorney for which he cannot be held responsible, that he bought the property on the 12th April, 1922. There would be nothing strange in the property being bought in 1915 and only transferred in 1922 as is instanced by the very acquisition of Elka Cele himself who apparently received transfer of the said property only some ten years after purchase by Deed of Transfer No. 1142/1917."

It was sought by plaintiff to rebut the evidence of defendant No. 1 that he built the first house in 1918 on the ground which in fact is portion of Lot Q. He called a witness Willie Crouch who, it is admitted, built the first house. This witness states he built the house in 1927 and could not have built it in 1918 as he was then on military service. The Native Commisisoner has not accepted Crouch's evidence. He goes so far as to state that Crouch was never on military service during the First World War. It is observed that Crouch could not produce any documents of military service which he states were destroyed in a fire.

The Native Commisisoner had this witness before him and this Court is not prepared to state that he had erred in discarding this evidence.

The whole case depends on credibility of evidence, except the last alternative ground of appeal which was not raised in the Court below. The Court below has accepted all the evidence adduced on behalf of defendants and we are not prepared to state that he has erred, as the record fully supports the findings.

The last alternative plea is without substance as the ownership of immovable property was unknown in Native Law and Custom. The case was conducted on Common Law principles and it is clear that the Native Commisisoner decided the case under Roman Dutch Law.

Counsel for applicant has sought to attack the Native Commissioner's reasons for judgment but this Court holds the view that good reasons are given and the Native Commissioner would appear to have taken considerable trouble in preparing the judgment. Counsel has quoted the following cases:—

Dube *v.* Ngema, 1941 N.A.C. (T & N) 42.
Sophiatown Land Owners' Association *v.* Lethoba, 1930 N.A.C. (T & N) 28.

Matlala *v.* Sehoha, 1938 N.A.C. (T & N) 1.
Mcunu *v.* Gumede, 1938 N.A.C. (T & N) 6.
Welgemoed *v.* Coetzer, 1946 T.P.D. 20.

This Court has consulted these cases and has carefully considered the principles laid down, with which we agree, but in the present case we have to consider whether the applicant has a fair prospect of success. It is clear from the record that the land in question was occupied adversely to the rights of plaintiff for a period in excess of the statutory prescriptive period laid down for the acquisition of immovable property by prescription and such adverse occupation was *nec vi, nec clam, nec precario.*

The application is accordingly refused with costs.

For Applicant/Appellant: Adv. Schneider, instructed by Mr. L. L. Ronthal of Johannesburg.

For Respondent: Mr. Darby of Messrs. Darby & Higgs, Durban.

Cases referred to:—

Dube *v.* Ngema, 1941 N.A.C. (T & N) 42.
Sophiatown Land Owners' Association *v.* Lethoba, 1930 N.A.C. (T & N) 28.

Matlala *v.* Sehoha, 1938 N.A.C. (T & N) 1.
Mcunu *v.* Gumede, 1938 N.A.C. (T & N) 6.
Welgemoed *v.* Coetzer, 1946 T.P.D. 20.

CASE No. 9 OF 1950.

OSCAR NYIRENDA (Appellant) *v.* PAULOS CILIZA (Respondent).

(N.A.C. Case No. 5/3/49.)

DURBAN: Tuesday, 31st January, 1950: Before Steenkamp, President, Ashton and Craig, Members of the Court, North-Eastern Division.

Law of Delicts: Damages for defamation—Use of word "ungqingili" (i.e., sexual pervert).

Practice and Procedure: Facts found proved and reasons for judgment must be fully set out.

Held: That rule 12 of Government Notice No. 2254 of 1928 requires that the facts found to be proved—all the relevant facts—shall be set out as well as the grounds upon which such facts were found proved and the reasons for rulings of law and admission or rejection of evidence.

Held: It is a serious matter to accuse a person of being a sexual pervert and that the defendant is rather fortunate that he did not have heavier damages awarded against him than one beast or its value, £8.

Appeal from the Native Commissioner's Court, Durban.

Steenkamp, President (delivering the judgment of the Court:—

Plaintiff sued the defendant for damages for defamation of character and in his summons he states that defendant accused him of being an "ungqingili"—a sexual pervert—in other words, that he was a sodomist.

In his plea the defendant denies the defamation.

The Native Commissioner granted judgment in favour of plaintiff for one beast or its value, £8, with costs. Against this judgment an appeal has been noted on the grounds that it is against the weight of evidence and against law.

The attention of the Presiding Officer in the Court below is drawn to rule 12 of Government Notice No. 2254 of 1928. He has furnished very brief—too brief—"facts found proved" and so-called "reasons for judgment". The rule requires that the facts found to be proved—all the relevant facts—shall be set out; the grounds upon which such facts were found proved and the reasons for rulings of law and admission or rejection of evidence. The "reasons for judgment" form part of the record and should be of great assistance to the Appeal Court, especially in cases where credibility of evidence is an issue. This cannot be said of the "reasons" furnished in this case.

According to the evidence of the plaintiff he was working in the kitchen at the Naval Barracks at Salisbury Island when the defendant entered and said: "Ciliza is this thing to Nala and another Amos". Plaintiff asked him what he meant and defendant then said that he was an "ungqingili", meaning that the plaintiff was one who had intercourse with other men.

There can be no doubt that these words are defamatory. Plaintiff is very fair in his evidence and he states that the defendant apologised after a report had been made to the Compound Manager. There must have been some trouble about the incident because the plaintiff was dismissed from service.

It is true that according to section 132 (1) of the Code, if a statement is made in the course of a heated quarrel and within a short period therafter the defendant publicly withdraws and publicly apologises for same, no claim for damages will lie, but in this case it should be remembered that the statements made by the defendant was not during a quarrel. The defendant in his evidence wants the Court to believe that he did not know the meaning of the word "ungqingili" as he is from Nyasaland, but this cannot be accepted by the Court, as the other words he used, namely—"is this thing to Nala and another Amos" can only mean that he was either sarcastic or meant that the plaintiff was a sexual pervert. It is a very serious matter to accuse a person of being a sexual pervert to the extent defendant insinuated about plaintiff, and the defendant is rather fortunate that he did not have heavier damages awarded against him. The remark he made could have led to a very serious breach of the peace.

The appeal is dismissed with costs.

For Appellant: Adv. R. W. Cowley instructed by Messrs. Cowley & Cowley, Durban.

For Respondent: Adv. A. M. Torf, instructed by Mr. R. I. Arenstein, of Durban.

Statutes, etc., referred to:—

Section 12 of Government Notice No. 2254 of 1928.

Section 132 (1) of the Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 10 OF 1950.

QULUNGELE MPANZA (Appellant) *v.* MHLEKWA SHEZI (Respondent).

(N.A.C. Case No. 27/4/49.)

ESHOWE: Friday, 3rd February, 1950: Before Steenkamp, President, De Vries and Leibnitz, Members of the Court (North-Eastern Division).

Native Law and Custom: "Sisa" cattle—Onus to report deaths is on "sisa" holder.

Held: That it is a strict duty of the "sisa" holder to take the skins of the dead animals to the owner and that there is no obligation on the part of the owner to call for the skins to be produced.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp, President (delivering the judgment of the Court):—

The defendant's daughter was engaged to the plaintiff but this engagement was broken off and therefore plaintiff was entitled to a refund of the lobolo he had paid. Plaintiff had rendered the daughter pregnant for which he was liable to pay the equivalent of two head of cattle.

The case came before the Chief who gave judgment in favour of plaintiff for nine head of cattle and £12 cash with costs. The Chief had deducted from plaintiff's claim an amount of £10 which he was liable to pay as damages for the seduction and pregnancy of defendant's daughter.

Defendant appealed to the Native Commissioner who reduced the Chief's judgment to four head of cattle and £12 with costs.

Plaintiff was satisfied with the Chief's judgment and the issue before the Native Commissioner was whether defendant had satisfactorily accounted for the alleged death of six head of cattle.

Plaintiff has now appealed to this Court. No grounds of appeal are given. This Court has to decide whether the defendant has satisfactorily accounted for six head of cattle he alleges had died. The Chief's judgment was reduced by the Native Commissioner to the extent of five head of cattle and this Court, in arriving at a decision will have to deal with the five head of cattle only as there was no cross-appeal from the Chief's judgment.

Engagement cattle are treated as "sisa" cattle until such time as a marriage does in fact take place.

The onus was on the defendant to account for the deaths of the cattle. In the case of Mafika *v.* Matubangana, 1912 (2) N.H.C. 80, *Chadwick* (J.) is reported to have stated:—"It was not for the plaintiff to find his goats but for the defendant to have accounted for them."

The Native Commissioner seems to have fallen into the error that there was some onus on plaintiff to bring evidence to contradict the defendant because he states in his reasons for judgment that plaintiff brought no evidence at all to contradict defendant's assertion that the six cattle died. Now, defendant's evidence on this question is:—

"I am not liable to return the five head which died because they died from natural causes. I made two reports to plaintiff. . . . Three days after the mpofukazi cow and its calf died plaintiff's wife came to my kraal and I told her to tell plaintiff that these two cattle had died from the cold. . . . Two

months after that the nsundukazi cow and the black cow died, I sent a message by one Ntshabangwana Shezi to report these two deaths to plaintiff. Three days after that plaintiff came to my kraal. I then reported to plaintiff the deaths of that nsundukazi cow and the black cow. About a month after that the calf of the nsundukazi cow died. Plaintiff happened to come to my kraal at that time paying a visit to his daughter who was living in that area and he spent a night at my kraal and I then told him of the death of this calf."

Defendant then goes on and states how the sixth beast died, i.e., a calf of a cow which is still alive. Defendant told one Madipo to report the death of this calf to the plaintiff.

We come now to the question whether the skins were ever produced to the plaintiff. It was elicited from defendant in cross-examination that he had shown the skins of the mpofukazi cow and its calf in the third year after they died. He admits he did not show the skins to plaintiff when he came to defendant's kraal. Defendant gives the reason for failing to do so, " as plaintiff's child was ill he got up very early in the morning and went away."

Defendant on being questioned by the Court admits he did not show the skins to plaintiff when plaintiff came the second time to his kraal because plaintiff had come to mourn the death of the child.

It is on this evidence that defendant avers that he had sufficiently accounted for the deaths of the cattle. It is true he reported the deaths at the dipping tank as testified by the tank foreman who was called as a witness by the defendant. This evidence of the tank foreman does not assist defendant in his defence as there is no evidence as to the number of cattle defendant dipped at that time. For all we know he might have dipped a considerable number of cattle in his name and any deaths reported do not mean that they were necessarily plaintiff's cattle. The Native Commissioner has attached some importance to the evidence of the tank foreman and he is under the impression that because there were several deaths amongst the cattle at defendant's kraal about the period in question he considers defendant's evidence has been corroborated.

The Native Commissioner has overlooked the fact that according to section 150 (3) of the Code and decided cases, there are certain obligations placed on the " sisa " holder and this Court will have to decide whether he has carried out such obligations.

In Nomgidi *v.* Galakaqa, N.C.H., reported in the summary of decided cases—paragraph 77, December, 1911 (mentioned by Whitfield on page 499 and Stafford on page 146), it was laid down as one of the essentials that the skins of the dead animals must be produced to the owner.

In Nogonomfana *v.* Ngane, 3 N.A.C. 35 (Transkei), the native assessors informed the Court that the deaths of the animals in question must be reported to their owner and their hides taken to him. Failure to follow this procedure would in the Native Law be regarded as an improper and unsatisfactory accounting for the stock and the holder would be held liable for it.

One of the obligations mentioned in Nomgidi's case (*supra*) is the responsibility of the property, entailing a strict duty on the holder's part immediately to report to the owner the loss by death or otherwise of the stock.

It is clear from these decisions that there is no obligation on the part of the owner to call for the skins.

The reports were not made immediately nor were the skins produced immediately. The production of the skins of the mpofukazi cow and its calf in the third year after death is not compliance with the requirements laid down. The defendant

acted lackadaisically right through and it very much appears that he was indifferent as to whether or not the owner received the messages, if any were ever sent, and he only has himself to blame for the position in which he finds himself. There was a duty on his part to have complied with the obligations entailed in such contracts of "sisa".

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"The appeal from the Chief's judgment is dismissed with costs."

Appellant: In person.

Respondent: In person.

Cases referred to:—

Nomgidi *v.* Galakaqa—Summary of decided cases—par. 77 Dec., 1911.

Mafika *v.* Matubanga, 1912 (2) N.H.C. 80.
Nogonomfana *v.* Ngane, 3 N.A.C. 35 (Transkei).

Statutes, etc., referred to:—

Section 150 (3) of the Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 11 OF 1950.

PIKALIPI GUMEDE (Appellant) *v.* MUHLE GUMEDE (Respondent).

(N.A.C. Case No. 7/5/49.)

ESHOWE: Friday, 3rd February, 1950: Before Steenkamp, President, de Vries and Leibnitz, Members of the Court, (North-Eastern Division).

Native Law and Custom: Allocation of girls—"Ukungena" union.

Held: That a son cannot sue, during his farther's lifetime, for the lobolo due in respect of a sister who was allotted to him.

Held: That where a widow lives with a brother of a deceased, the union is presumed to be an "ngena" union.

Appeal from the Court of the Native Commissioner, Eshowe.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff (appellant in this Court) sued the defendant (respondent in this Court), in the Chief's Court for nine head of lobolo cattle.

There was a dispute as to what the Chief's judgment was. Both the defendant and the plaintiff were under the impression that judgment was granted in favour of defendant, whereupon plaintiff appealed to the Native Commissioner. When the appeal came before the Native Commissioner the Chief was present and he informed the Court that he could not understand the reason for the appeal by the plaintiff as he had given judgment in his favour. The judgment was actually registered in the office of the Native Commissioner as one in favour of defendant.

The Native Commissioner had first of all to decide in whose favour the Chief had given judgment. After hearing evidence from the Chief and from the plaintiff, the Native Commissioner came to the conclusion that the Chief had given judgment in favour of plaintiff. It therefore followed that the appeal noted by plaintiff lapsed and defendant was thereafter granted permission to appeal against the Chief's judgment.

It is not necessary to go into the history of the lobolo cattle as this Court has to give a crisp decision as to whether plaintiff's father was his legal father or only an "ngena" father.

It appears that the late Bekameva married a woman by the name of Bapenyile and on his death it is alleged by the defendant that a brother of his father by the name of Zonke "ngenaed" Bapenyile. Plaintiff, however, alleges that, his father actually married this widow of the late Bekameva and, therefore, there is a heavy onus on him to prove that it was a marriage and not an "ngena" union.

Before dealing with this aspect of the case, it is, however, necessary to state that plaintiff's natural father Zonke is still alive and as the dispute in the case is in connection with the allocation of one of the daughters of the woman Bapenyile, it would appear that the action is premature. This Court does not see how the plaintiff can, during the lifetime of his father, sue on the allegation that his sister was allocated to him.

It has been held on numerous occasions that a son who claims that a sister has been allocated to him cannot sue for her lobolo during the lifetime of his father. It is only necessary to quote the case of Notagaza *v.* Teyise, 1904 N.H.C. 12, in which it was laid down that an action during the lifetime of the father is premature as all property at the kraal is presumed to belong to the kraalhead. (See also remarks on page 54 of Stafford's book.)

When the Court mentioned this irregularity to Counsel for appellant he intimated that as the point was not taken in the Court below, it is too late now to do so. It is, however, not necessary to labour this aspect of the case as appellant, on the merits, cannot succeed.

Now, coming to the question as to whether the late Zonke married the woman or whether he only "ngenaed" her, the Native Commissioner has come to the conclusion that it was an "ngena" union.

Counsel for appellant (plaintiff) has conceded that if the union between Bapenyile and Zonke was an "ngena" one, the appellant cannot succeed.

Bapenyile herself gave evidence and stated that the reason she left her late husband's kraal for Zonke's kraal is that there were no longer any men left at the kraal. It has been argued that this statement is not correct, but it was laid down in the case of Magubane *v.* Magubane, 1948 N.A.C. (T. & N.) 29 on page 31, that taking up residence at the "ukengena" husband's kraal does not negative the fact that the union is an "ukengena" one, for she is still in the "family circle".

The witness Zingoni, a nephew of the late Bekameva, states that the woman Bapenyile went and lived with Zonke, but he was not asked how long after her husband's death did she move, and therefore we only have the evidence of the woman herself.

Zonke himself gives rather vague evidence. For instance he states:—

> "I understood that it was not an "ngena" union. The woman did not say I was to raise seed on behalf of my brother (deceased). . . I was chosen to "ngena" Bapenyile and to marry her. The other brother said I had to pay lobolo."

Surely this man should be able to state definitely whether he married or "ngenaed" the woman. It was peculiarly within his own knowledge as to whether he was an "ngena" husband or otherwise.

As pointed out by the Native Commissioner there are discrepancies in defendant's evidence, but it must not be overlooked that this union was presumed to be an "ngena" union and there was an onus on the part of plaintiff to discharge that presumption, which he has not been able to do conclusively.

There is another aspect which weighs heavily against the plaintiff, and that is that the woman, after some years, returned to her late husband's kraal. Zonke's explanation for this seems rather weak where he states that she was mad and he could not get on with her. When it is taken into consideration that she returned with all her children, including those of which Zonke was the natural father, then it would seem as if Zonke knew all along he had no control over the woman whom he wishes to call his wife, and she could choose to live at her late husband's kraal.

Both Counsel quoted the case of Ngengemana *v.* Mahanjana, 1915 N.H.C. 153. In that case the woman had returned in her declining years to the kraal of her first husband to go and live with her children of the first marriage, but she left behind the daughter she had of the second union, and the Court held that this was not sufficient indication that the second union was only an "ngena" one. The present case can easily be distinguished from that one, as in this case the woman took *all* the children of both unions and returned to her deceased husband's kraal.

The Court accordingly finds that the union between Bapenyile and Zonke was an "ngena" one, and, appellant's Counsel has conceded that if this is so, the appellant cannot succeed.

The appeal is dismissed with costs.

For Appellant: Mr. H. H. Kent, of Eshowe.

For Respondent: Mr. S. H. Brien, instructed by Mr. P. B. Rutherfoord, of Eshowe.

Cases referred to:—

Notagaza *v.* Teyise, 1904 N.H.C. 12.
Ngengemana *v.* Mahanjana, 1915 N.H.C. 153.
Magubane *v.* Magubane, 1948 N.A.C. (T. & N.) 29.

CASE No. 12 OF 1950.

GEORGE NGOBENI (Appellant) *v.* PIET CHAUKE (Respondent).

(N.A.C. Case No. 57/5/49.)

PRETORIA: Monday, 6th March, 1950. Before Steenkamp, President, O'Connell and Smithers, Members of the Court (North-Eastern Division).

Practice and Procedure: Rescission of judgment on main claim and remittal of case for trial on alternative claim.

Held: By virtue of the powers under section 15 of the Native Administration Act (No. 38 of 1927), this Court may set aside a judgment on a main claim and remit the case to be tried on the alternative claim, especially as it is not possible for plaintiff to receive satisfaction of the judgment.

Appeal from the Court of the Native Commissioner, Pretoria.

Steenkamp, President (delivering the judgment of the Court):—

In this case judgment was granted in favour of defendant (respondent) with costs.

Plaintiff (appellant) has noted an appeal to this Court, but on the day of hearing the respondent filed an application which reads as follows:—

"Be pleased to take notice that the respondent will, at the hearing of the appeal which has been noted in the above matter by notice of appeal, dated the 23rd day of November, 1949, and which appeal has been set down for hearing before the Honourable Court on the 6th day of March, 1950, make application as follows:—

The respondent prays that it may please this Honourable Court to set aside the judgment of the Additional Native Commissioner of Pretoria delivered in this matter, dated the 11th day of November, 1949, and to remit the case back to the Court *a quo* for adjudication upon the respondent's alternative plea and the counterclaim filed of record and dated the 11th day of April, 1949."

In the case before the Native Commissioner the plaintiff sued the defendant for an order of ejectment from Plot No. 346, Walmansthal, Pretoria.

Defendant's main plea is to the effect that he had bought this property from an agent named Seele and he claimed that he was entitled to live on the property. He filed an alternative plea which reads to the effect that, should the Court find that plaintiff is not estopped from ejecting the defendant, and only in that event, defendant pleads that he is entitled to be paid an amount of £200 being the improvements he effected on the property since he took occupation. He also filed a counterclaim which had to be taken into consideration only in the event of the Court holding that plaintiff is entitled to eject the defendant.

The Native Commissioner entered judgment for defendant with costs and therefore the alternative plea and the defendant's counterclaim fell away and the Court could not adjudicate on these.

In arguing the application Counsel for respondent has informed the Court that since judgment was given by the Native Commissioner the plaintiff has disposed of the property and a new purchaser has received title. He also mentioned that, so far as he knew, the new purchaser was not aware of the fact that the property had previously been sold to the defendant.

The judgment given by the Native Commissoiner is therefore an empty shell and the defendant is left with the cold comfort of having been granted a judgment to the effect that he cannot be ejected by the plaintiff but this defence will be of no avail if the new purchaser seeks to eject him and defendant will then have to sue the present plaintiff for refund of the purchase price he paid and for damages based on the improvements he effected on the property.

At first blush one gains the impression that the defendant must stand or fall by his pleadings, but this Court realises that additional expenses and probably heavy costs will be involved if plaintiff now has to bring a fresh action. This Court has wide powers under section 15 of the Native Administration Act, No. 38 of 1927, by virtue of which it is empowered to set aside a Native Commissioner's judgment and to remit the case to the Native Commissioner for further hearing.

It is also realised that the pleadings as they now stand will debar the respondent (defendant) from proceeding with his alternative plea and with his counterclaim, but as the Native Commissioner has the power to amend the pleadings on application, before judgment, this Court is of opinion that the difficulties apparent on the record are not unsurmountable.

This Court therefore holds that, in the circumstances of the case, the judgment given by the Native Commissioner should be set aside and the record returned to him to consider any application that might be made for the amendment of the pleadings and counterclaim, and also for such additional evidence as either party might wish to call, and thereafter to give a fresh judgment.

There is the question of costs. Counsel for appellant (plaintiff) has argued that defendant should bear the costs of to-day, whereas Counsel for respondent has advanced the view that either there should be no order as to costs of the appeal or that costs should be costs in the cause.

The appeal has not been argued on its merits and therefore the Court is not in position to state what its judgment might have been, but we feel that the the most equitable decision would be that costs in the Court below and costs of appeal should be costs in the cause.

It is therefore ordered, which we hereby do, that the judgment of the Native Commisisoner be set aside and that the record be returned to him to hear and determine any application that might be made before him for the amendment of the pleadings and the counterclaim, and to hear such additional evidence as either party might wish to adduce, and thereafter to deliver a fresh judgment.

Costs of appeal and costs in the Court below to be costs in the cause.

For Appellant: Adv. C. F. Eloff (instructed by Messrs. Edelstein & Veale.

For Respondent: Adv. M. R. de Kock (instructeed by Messrs. Rooth & Wessels.

Statutes, etc., referred to:—

Section 15 of Act No. 38 of 1927.

CASE No. 13 OF 1950.

JOSEPH MABUZA (Applicant/Appellant) *v.* **DICK MATHOLE (Respondent).**

(N.A.C. Case No. 60/3/49.)

PRETORIA: Tuesday, 7th March, 1950: Before Steenkamp, President, O'Connell & Smithers, Members of the Court (North-Eastern Division).

Practice and Procedure: Application, recission of default judgment of Native Appeal Court.

Application for increased costs—Refused.

Held: That the non-appearance of Counsel on the date of hearing was due solely to his own negligence; that no irreparable harm will follow if the application is refused because appellant will still have open to him his remedy by way of a separate action and that the record discloses that there is no reasonable prospect of a successful appeal against the Native Commissioner's judgment.

Held: That in regard to the application by Counsel for respondent for an increased fee, the Court feels that no extra preparation was required in connection with the matter and the application is accordingly refused.

Appeal from the Court of the Native Commissioner, Hammanskraal.

O'Connell (Member) (delivering the judgment of the Court):—

On the 6th December, 1949, the above-mentioned appeal was on the roll for hearing. On that date neither appellant nor his Counsel appeared and the appeal was accordingly dismissed for want of prosecution.

Application has now been made for the rescission of the default judgment dated the 6th December, 1949, on the ground that appellant's attorney did not appear on the 6th December, 1949, because he was mistakenly under the impression that the appeal would be heard on the 7th December, 1949.

In an affidavit in support of the application, appellant's attorney states he was approached by respondent's attorneys with a request that arrangements be made to postpone the case until the 17th December, 1949, because the member of their firm who had dealt with the case would be absent on leave on the date set down for the hearing of the appeal, i.e., the 6th December, 1949. He thereupon wrote to the Native Commissioner, Hammanskraal, requesting that the case be set down for hearing in 1950 and at the same time returning the notice of set-down. Subsequent to this, he received a message by telephone from the Registrar of this Court to the effect that there was no question but that the appeal would have to be heard on the date originally set down and that he, the Registrar, would notify the other side to that effect. He then instructed his clerk to diarise the date of hearing for the 7th December, 1949. He states that he is unable to explain why the mistake in the date was made and can only advance the theory that it was due to confusion in his mind following upon the discussion of a postponement until the 17th December. On the morning of the 7th December, 1949, he telephoned the Registrar to ascertain the time when the appeal would be heard that day, and was then informed that it had been disposed of the previous day.

A reference to the record in the case discloses that appellant's attorney had signed the notice of set-down and should therefore have been fully aware of the date of hearing of the appeal, and there is no doubt that his non-appearance on the date in question was due solely to his own negligence. In the case of Rose and another *v.* Alpha Secretaries, Ltd., S.A.L.R. 1947 (4) at pages 518/519 this aspect is fully dealt with, and *Tindall* (*J.A.*) summarises the attitude of the Court as follows:—

> "It is preferable to say that the Court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the Court in holding, in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown."

In this particular case the record reveals that the Native Commissioner entered judgment for plaintiff on the main claim but pronouced no judgment on the counterclaim, as he should have done. No irreparable harm will follow if the application is refused because appellant will still have open to him his remedy by way of separate action. Further, a reference to the record discloses that there is no reasonable prospect of a successful appeal against the Native Commissioner's judgment.

It is therefore ordered, which we hereby do, that the application to rescind the default judgment entered on the 6th December, 1949, be refused with costs.

In regard to the application by Counsel for respondent for an increased fee, the Court feels that no extra preparation was required in connection with the matter and the application is accordingly refused.

For Applicant/Appellant: Mr. Goudvis of Messrs. Austin & Goudvis, Pretoria.

For Respondent: Adv. C. F. Eloff, instructed by Messrs. Gillet & Odendaal, Pretoria.

Cases referred to:—

Rose and another *v.* Alpha Secretaries Ltd., S.A.L.R. 1947 (4), pages 518/519.

CASE No. 14 OF 1950.

SIBOSHWA KOZA (Appellant) *v.* MBULAWA MTETWA (Respondent).

(N.A.C. Case No. 44/1/49.)

PRETORIA: Tuesday, 7th March, 1950. Before Steenkamp, President, O'Connell and Smithers, Members of the Court, (North-Eastern Division).

Law of Delicts: Assault—Defences—Retaliation.

Held: That the words "such injuries were caused as a result of an assault provoked by plaintiff" have a wide meaning and would certainly cover the defence that a blow which caused the injury was inflicted as a retaliation after plaintiff had hit the defendant.

Appeal from the Court of the Native Commissioner, Barberton.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff (appellant in this Court) sued the two defendants for 20 head of cattle or their value £200 as damages for certain injuries suffered by him as a result of an alleged assault by the defendants.

By claiming 20 head of cattle as damages it is apparent that the plaintiff intended to claim damages under Native Law and Custom. There is no indication that the case was tried under Common Law or Native Law. In any case in the Union of South Afrcica with the exception of Natal, a claim for damages for assault does not exist under Native Law and Custom. Normally the record would have been returned to the Native Commissioner to indicate under what system of law he tried the case (see *ex parte* the Minister of Native Affairs, 1948 (1) S.A.L.R. 388), but in view of the decision of this Court on the facts and law, it does not wish the parties to incur further costs.

Defendant No. 2 pleaded a denial of the assault but admitted that injuries were caused but that such injuries were caused as the result of an assault provoked by plaintiff and were inflicted in self-defence.

Defendant No. 1 pleaded a denial that he assaulted the plaintiff. The Native Commissioner entered an absolution judgment from the instance with costs.

Plaintiff has now lodged an appeal against the judgment in so far as it affects defendant No. 2 (respondent in this Court).

The ground of appeal is as follows:—

> "That on the assumption that the evidence given by and led on behalf of the defendants is correct, the Court nevertheless erred in holding that the assault upon the plaintiff by Mbulawa (respondent) and inflicting by him of the injuries to plaintiff, was justified by the plea of self-defence or for any other valid reason."

The Native Commissioner in his reasons came to the conclusion that plaintiff had not proved that the assault on him was unprovoked and therefore entered a judgment of absolution from the instance with costs.

Respondent's evidence on which the appeal is relied, reads as follows:—

> "Sakasaka came and struck, Mawewe. Sakasaka asked Mawewe what he had said to him and struck him a light blow with a stick. Mawewe is an umfaan. Njodjele (defendant No. 1) asked him why he struck Mawewe and he struck Njodjele.
>
> I got up and tried to separate them and it was at this stage that plaintiff struck me. Plaintiff was also sitting with us. Plaintiff hit me with a stick on my head. I show the mark. It was a kirrie about 4 foot long. I was struck down and I was bleeding. I asked him why he struck me. I picked up a stick and struck him one blow on the right eye and I then ran away. Plaintiff fell down. I did not hit him on the mouth or cheeks."

This evidence by the respondent is substantially corroborated by the defendant No. 1 and by two other witnesses. Respondent had called another witness but that witness' evidence should be discarded as he states he had his back towards the fighters.

It is for this Court to decide whether the respondent's retaliation after he had been hit by the appellant was reasonable or whether he had exceeded what one would expect a person in similar circumstances to have done when assaulted.
Nathan in his book "South African Law of Torts" on page 170, states:—

> "It is no assault if one strikes another where there has been provocation or in legitimate self-defence, as it is permitted to repel force by force."

It is clear from the evidence on which the appellant relies that respondent retaliated in the heat of the moment after having been struck on the head, and as remarked in the case of Bida *v.* Njomane, 1936 N.A.C. (C.O.) 93, considerable allowance must be made for the state of mental excitement which as a rule follows an aggression upon the person. Respondent only delivered the one blow at the appellant and it is rather unfortunate that this blow resulted in the appellant losing his eye, but this Court is satisfied that it was not the intention of the respondent to have purposely tried to deprive the appellant of the sight of the eye.

There is the question whether the defence of "retaliation" is covered by the plea which, as well as the summons, was badly drawn up. It was argued on behalf of the appellant that retaliation is not covered by the words "self defence", but this Court holds the view that the words "such injuries were caused as a result of an assault provoked by plaintiff" have a wide meaning and would certainly cover the defence that the blow which caused the injury was inflicted as a retaliation after plaintiff had hit the defendant.

In the circumstances respondent was justified in having repelled force by force and therefore we hold the view that the appellant cannot succeed.

There are many discrepancies as pointed out by the Native Commissioner in the evidence adduced on behalf of the appellant, but as the appellant is relying entirely on the evidence given by the respondent, this Court is not called upon to find whether appellant's evidence or that of the respondent should be accepted.

The appeal is dismissed with costs.

For Appellant: Adv. C. Mouton, instructed by Messrs. Dyason & Gie, Pretoria.

For Respondent: Adv. D. Curlewis, instructed by Messrs. Stegmann, Oosthuizen & Jackson, Pretoria.

Cases referred to:—

Ex parte Minister of Native Affairs, 1948 (1) S.A.L.R. 388.
Bida *v.* Njomane, 1936 N.A.C. (C.O.) 93.

CASE No. 15 OF 1950.

GUSTAV PELO (Appellant) *v.* EFRAIM MOKOGOKO AND OTHERS (Respondents).

(N.A.C. Case No. 8/50.)

PRETORIA: Thursday, 9th March, 1950: Before Steenkamp, President, O'Connell and Smithers, Members of the Court (North-Eastern Division).

Practice and Procedure: Pleas and exceptions in Native Commissioners' Courts.

Held: That where a plea in bar goes to the very root of the action, then it is a proper answer to the summons; but where a plea in bar is of such a nature that further information is necessary for its determination, then the Court requires a plea on the claim and, if necessary, evidence to indicate whether a defence on non-joinder is sound.

Appeal from the Court of the Native Commissioner, Brits.

Steenkamp, President (delivering the judgment of the Court):—

Before dealing with the appeal as such, this Court wishes to pass certain comments.

The judgment on the plea in bar was given on the 20th May, 1949. On the 27th May, the attorney for defendant (appellant in this Court) applied for the Native Commissioner's written judgment. The request had not been complied with by the 15th June, 1949, whereupon appellant noted an appeal. The Clerk of the Court did not notify the Registrar of the Appeal Court in terms of rule 16 of the Native Appeal Court Rules, as published in Government Notice No. 2254 of 1928. This rule reads as follows:—

"Upon an appeal being noted the Clerk of the Native Commissioner's Court shall *immediately* notify the Registrar of the Native Appeal Court. . . ."

No action was apparently taken until the 12th January, 1950, when the attorney for appellant enquired from the Native Commisioner as to what the position was. Only after the receipt of this letter did the Native Commissioner prepare his reasons and hand them over to the Clerk of the Court on the 21st January, 1950. No explanation is given for this delay.

Attention is invited to rule 3 of the Native Appeal Court Rules which reads that on receipt of a request for a written judgment, the Presiding Officer shall, within seven days, deliver to the Clerk of the Court a written judgment.

Such tardiness on the part of the Clerk of the Court and of the Native Commisioner cannot pass without comment. It is trusted that the Clerk of the Court and the Native Commissioner realise that these rules were passed to be carried out and not to be ignored.

In the absence of an explanation, this Court can only come to the conclusion that there has been neglect of duty on the part of the officers concerned.

The plaintiff's (respondents in this Court) are suing the defendant for ejectment from a house situated on a farm which is registered in undivided portions in the names of the plaintiffs and many others.

A plea in bar was taken, which reads to the effect that the summons does not disclose a cause of action and that the plaintiffs are not entitled to bring this action unless all the co-owners of the farm are cited either as plaintiffs or defendants.

The parties agreed before the Native Commissioner that this issue be settled by Court before evidence is heard.

The Native Commissioner dismissed the exception and plea in bar; and an appeal has now been noted to this Court on the following ground:—

"Dat die Kommissaris verkeerd was om die eksepsies en besware teen die dagvaarding opgewerp van die hand te wys, naamlik dat dit geen volledige oorsaak tot 'n eis aantoon nie en/of dat al die eienare van die grond waarvan eisers gedeeltelike gesamentlike eienare is òf as eisers òf as verweerders gesiteer moet word voordat die saak verhoor kan word."

Counsel for appellant at the commencement of his argument abandoned the first part of the exception in which it is stated that the summons does not disclose a cause of action and he thereafter, in a very able argument, contended that on the pleadings it was necessary for all the co-owners to be cited either as plaintiffs or defendants. Several cases were quoted, the latest being Amalgamated Engineering Union *v.* Minister of Labour, 1948 S.A.L.R. (3), 677, and while the principles laid down are sound, this Court cannot overlook the fact that in the case now before the Court it is not possible from the claim to determine whether the individual rights of the plaintiffs only are affected or any joint rights of the other co-owners of the farm in any way jeopardised. The rights of individual co-owners were dealt with in the case of Jacobus Pelo *v.* Efraim Mokgoko and others which came before this Court on appeal in case No. N.A.C. 90/1/48. There the Court held that the respondents (in that case) could maintain an action without all the co-owners being joined as plaintiffs. As that case was not reported, it is necessary to set out the remarks of the Court:—

"In the opinion of this Court any one or more of the co-owners may seek redress in a Court of law if it can be proved that their undivided rights are being tampered with. This Court has in view a case where one of the co-owners erects a building on ground set aside and so used by him for arable purposes, and another co-owner builds a house thereon. Surely the rights enjoyed by him are being infringed and he and he alone may seek redress in a Court of law. If it were otherwise, one or more of the co-owners in undivided shares may infringe the rights of another co-owner with the connivance of other co-owners, to such an extent that life will become unbearable for him and he might be forced off the farm and, because other co-owners are not willing to assist, or are absent, he is left with the cold comfort of swallowing an injustice. Where there is an injury of this nature there must be a remedy."

"Joint property cannot be converted to purposes other than those for which it is intended, nor can it be applied to new uses [Maasdorp, Second Volume, page 149 (7th Ed.)]."

"It therefore follows that where it was decided or intended that certain ground in a joint farm is to be used for grazing or arable purposes, then no co-owners can use that ground for building purposes, and if he does so, the co-owner who suffers thereby may seek redress in a Court of law."

"Maasdorp goes on and states that if any ground is used by one of the owners for the purposes other than those intended, he may be interdicted and compelled to restore the property to its original condition."

In that case the appeal succeeded on other grounds. Counsel for respondent has ably argued that as the point taken in this case is one of procedure, this Court is not in a position to give a decision until such time as a plea is filed and there is more information before the Court.

This Court agrees with these views but there is another aspect to which attention is drawn. In the case of Linda & others *v.* Linda, 1943 N.A.C. (T. & N.) 40, and in many other cases, it was laid down that no provisions exist in the Native Commissioners' Court Rules for objections and exceptions, and that technicalities should be avoided as far as possible; if, therefore, the directions therein had been followed, this impasse would not have arisen.

This Court will concede that where a plea in bar goes to the very root of the action, then it is a proper answer to the summons; but where the plea in bar is of such a nature that further information is necessary for its determination, as is shown in the present appeal, then the Court requires a plea on the claim and, if necessary, evidence to indicate whether a defence of non-joinder is sound.

It seems to us that the record will have to show that other owners have such proprietary rights and that a judgment in favour of the plaintiffs will prejudice those rights.

The summons is badly drawn, but any difficulty therein can be remedied by a request for further particulars and for defendant then to plead over and, if necessary, plead the plea in bar. The result is that this Court is not in a position to give a decision on the question of non-joinder and therefore the appeal is dismissed with costs and the record returned to the Native Commissioner to enable the parties to proceed in the light of the remarks made.

For Appellant: Adv. N. S. Malherbe, instructed by J. S. Wicht of Brits.

For Respondents: Adv. J. P. O. de Villiers, instructed by J. Erasmus of Brits.

Statutes, etc., referred to:—

Section 3, Government Notice No. 2254 of 1928.
Section 16, Government Notice No. 2254 of 1928.

Cases referred to:—

Amalgamated Engineering Union *v.* Minister of Labour, 1948 S.A.L.R. (3) 677.

Linda and others *v.* Linda, 1943 N.A.C. (T. & N.) 40.

CASE No. 16 OF 1950.

JOSEPH SEKOELE AND OTHERS (Applicants/Appellants) *v.* JOHANNES SEKOELE AND OTHERS (Respondents).

(N.A.C. Case No. 52/1/49.)

PRETORIA: Thursday, 9th March, 1950. Before Steenkamp, President, O'Connell and Smithers, Members of the Court (North-Eastern Division).

Practice and Procedure: Application—Rescission of default judgment of Native Appeal Court.

Held: That petitioners for the rescission of the judgment had taken all reasonable steps to prosecute the appeal and that, in the spririt of section 15 of the Native Administration Act, No. 38 of 1927, relief should be granted to the petitioners.

Held: That the mere fact of applicants having noted an appeal and having applied for indulgence of the Court, is sufficient indication that, in their opinion, they have reasonable prospect of success on appeal.

Appeal from the Court of the Native Commissioner, Pietersburg.

O'Connell, Member (delivering the judgment of the Court):—

On the 5th December, 1949, this appeal was on the roll for hearing. On that date the appellants failed to appear and the appeal was dismissed for want of prosecution.

Application has now been made to this Court to rescind the default judgment granted on the 5th December, 1949, and for the granting of leave to prosecute the appeal, on a date to be set down by this Court.

The affidavit in support of the application reveals the following facts:—

1. That appeal was noted timeously by applicants' attorneys, Messrs. Barrangé, Wasserzug & Fleishack, of Johannesburg, who signed the notice of appeal for Messrs. Naudé, Naudé & Macdonald of Pietersburg.

2. That the Johannesburg attorneys did not receive the notice of set-down of the appeal and, on or about the 4th January, 1950, wrote the Registrar of this Court, asking for the date of set-down. They were then advised of the Court's order, dated the 5th December, 1949.

3. That, on account of the foregoing, the non-prosecution of the appeal was not due to any negligence or wilful default on their part.

The application was opposed by the respondents on two grounds, namely (1) that incomplete information had been furnished in the application as to why proper steps had not been taken by the Pietersburg correspondents of applicants' attorneys to advise the latter of the date set-down as it was revealed by the record that the notice had been signed on their behalf, and (2) that the affidavit did not contain an averment that a reasonable prospect of success on appeal existed.

Counsel for applicants stated from the Bar that Mr. Macdonald the Pietersburg firm of attorneys admitted negligence in this matter and it is clear that this firm of attorneys was at no stage concerned with the case.

This Court is satisfied that the petitioners had taken all reasonable steps to prosecute the appeal and it feels that, in the spirit of section 15 of the Native Administration Act, No. 38 of 1927, it should come to the relief of the petitioners. It has already been decided in Zuma v. Ngubani, 1947 N.A.C. (T & N) 80, that this Court has the power to rescind its own judgments granted by default.

Respondents' Counsel's submission on the second point taken by him can be disposed of briefly, as the mere facts of applicants having noted an appeal and having applied for this indulgence are sufficient indication that, in their opinion, they have a reasonable prospect of success on appeal. We are, however, treating the application as such, and it is not necessary for this Court to consider whether applicants have a reasonable prospect of success.

A further submission by Counsel for respondents was that in the petition appeared no offer to pay the costs of the hearing when the default judgment was granted. This defect may, however, be cured by this Court. Finally, Counsel for respondents also submitted that, in terms of the application, leave was being sought, in addition to rescinding the judgment, to prosecute the appeal—"on such date as may be set down by this honourable Court"—and that he was, therefore, not in a position to-day to argue the appeal on its merits. It is usual for this Court, when indulgence is granted, to order that the appeal be argued forthwith but, in view of the fact that counsel for respondents is unable to do so in this case because he was misled by the wording of the application, this Court is prepared to depart from its usual practice.

It is therefore ordered as follows:—

> The application is granted and the judgment of this Court dismissing the appeal with costs is hereby rescinded. Permission is granted to prosecute the appeal at the next session of this Court on the 12th June, 1950, subject to the prior payment by applicants of the costs of this application and the costs of the previous hearing in this Court.

For Applicants/Appellants: Adv. J. D. Jerling, instructed by Messrs. Berrangé, Wasserzug & Fleishack, Johannesburg.

For Respondent: Adv. J. J. Trengove, instructed by Messrs. Chaitow & Hirschmann, Pietersburg

Statutes, etc., referred to:

Section 15 of Act No. 38 of 1927.

Cases referred to:

Zuma *v.* Ngubane, 1947 N.A.C. (T & N) 80.